STATE OF MICHIGAN

COURT OF APPEALS

BIORESOURCE, INC.,

Plaintiff-Appellee,

and

OPPMAC, INC.,

Intervening Plaintiff-Appellee,

v

CITY OF DETROIT,

Defendant-Appellant,

and

JOSEPH VASSALLO, PAUL BERNARD, FREDERICK ROTTACH, STATE OF MICHIGAN, DIAMOND DISMANTLING, INC., CENTRAL MAINTENANCE SERVICES, INC., SAM FODALE, and JERRY FODALE,

Defendants.

UNPUBLISHED
March 16, 2010

No. 288263
Wayne Circuit Court
LC No. 01-123531-CH

Before: JANSEN, P.J., and MURRAY and GLEICHER, JJ.

PER CURIAM.

Defendant, city of Detroit, appeals as of right the trial court's order providing for the distribution of rental funds held in escrow to intervening plaintiff, Oppmac, Inc. We affirm.

I. BACKGROUND

This appeal arises out of Oppmac and the city of Detroit's competing claims over which party is entitled to rental payments on a parcel known as the old Packard plant. The problems underlying this case stretch back to 1987 when plaintiff Bioresource, Inc., purchased the plant subject to a mortgage held by Land & Norry Associates (L & N), Oppmac's predecessor in interest. Notably, paragraphs 10 and 16 of the mortgage required the mortgagor to assign leases

to the mortgagee as security and permitted the mortgagee to collect rent in the event of default. At the time Bioresource acquired the property, Astro Enterprises, Inc., (Astro) was the lessee.

For several years after acquiring the property, Bioresource failed to pay property taxes and, according to Oppmac, failed to make mortgage payments. The city subsequently initiated foreclosure proceedings in 1993 and 1997 and acquired title to the property.[1] However, on July 11, 2001, Bioresource filed suit to quiet title, arguing that although the city had acquired the property years earlier in foreclosure proceedings, Bioresearch was the fee simple owner because the city had failed to provide notice of the foreclosure proceedings to L & N, rendering those proceedings void.[2] Having acquired L & N's interest in the mortgage, Oppmac intervened claiming that because it had redeemed the property in a previous lawsuit,[3] plaintiff's ownership interest was restored subject to the mortgage and Oppmac was therefore entitled to recover any rental proceeds from tenants renting the property.

The city subsequently moved for summary disposition, and the trial court ruled that although Oppmac had a valid mortgage interest, Bioresource did not have a vested right of redemption in light of the valid foreclosure. Additionally, the court held that the city's failure to provide notice did not alter that validity. On appeal, this Court initially affirmed that order, *Bioresource, Inc v City of Detroit*, unpublished opinion per curiam of the Court of Appeals, issued May 27, 2004 (Docket Nos. 241137 and 241168) ("*Bioresource I")* but on rehearing reversed the order because Oppmac had properly redeemed the property and remanded for the trial court to determine the effect of the redemption on the parties' respective interests to the property. *Bioresource, Inc v City of Detroit (On Rehearing)*, unpublished opinion per curiam of the Court of Appeals, issued September 28, 2004 (Docket Nos. 241137 and 241168) ("*Bioresource I, On Rehearing"*). Our Supreme Court denied defendant's application for leave to appeal. *Bioresource, Inc v City of Detroit*, 474 Mich 1072; 711 NW2d 326 (2006).

On remand, after Bioresource moved for partial summary disposition, the court found that Oppmac had redeemed the property under MCL 211.131c(4) thereby restoring Bioresource's ownership interest subject to any mortgage interest Oppmac may have had on the property as well as liens in favor of Oppmac and the city for the amount each paid to redeem the property.[4]

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[1] Bioresource filed for chapter 11 bankruptcy, 11 USC 101 *et seq*., after foreclosure proceedings commenced, and an order was entered in that matter confirming that the city had title to the property.

[2] Bioresource also alleged nuisance, trespass, inverse condemnation, tortious interference, and negligence.

[3] Oppmac initiated that suit in 1999 alleging, among other tort claims and violations, that it was entitled to rent from the property. A court order issued August 10, 2000, authorized Oppmac's redemption of the property for $700,000 and required Oppmac to make an additional payment of $495,247.80 in back taxes. After Oppmac paid $700,000 in October 2000, the court dissolved the order to the extent it required Oppmac to pay the additional back taxes, apparently because that amount was offset by rent collected by the city between 1997 and 1999. Oppmac's additional tort claims against the city were also dismissed.

[4] The city had also previously redeemed the property from the State of Michigan and paid
(continued…)

The court denied Bioresource's motion, however, insofar as it challenged the validity of the foreclosure proceedings and dismissed its remaining claims for damages.

On appeal, this Court held that the law of the case doctrine precluded the city's argument that Oppmac's payment of $700,000 was insufficient to redeem the property because the amount did not cover all back taxes owed[5] where "*Bioresource I, On Rehearing* was aware that the redemption amount was a contested issue in Oppmac's earlier lawsuit, but determined that Oppmac was permitted to redeem the property upon payment of $700,000." *Bioresource, Inc v City of Detroit*, unpublished opinion per curiam of the Court of Appeals, issued August 17, 2006 (Docket No. 266668) ("*Bioresource II*"), slip op at 4. Additionally, the Court declined to address the city's claim that the trial court erred in Oppmac's prior suit in determining that Oppmac could redeem the property for $700,000 because the city failed to raise that issue in the case brought by Oppmac. *Id*. Thus, as the city did not challenge the effect of Oppmac's redemption on plaintiff's ownership of the property, this Court affirmed the court's determination that Bioresource owned the property subject to Oppmac's mortgage and the liens in favor of Oppmac and the city. *Id*.

While that appeal was pending, the city and Astro stipulated to entry of an order creating an escrow account for rent originally due to Bioresource and providing for allocation of those funds to be determined upon the final disposition of the instant case. Following the Supreme Court's denial of the city's application for leave to appeal in *Bioresource II*, *Bioresource, Inc v City of Detroit*, 477 Mich 1004; 726 NW2d 372 (2007), the city filed a motion in the trial court to reopen the case to allow for disposition of the rental escrow, which totaled over $100,000. Oppmac filed a motion to intervene, asserting its interest in the rental escrow under the mortgage. Specifically, Oppmac argued that it was not required to foreclose on the mortgage to collect rent since its interest was perfected when the mortgage was filed.

After hearing argument on these motions, the court granted the city's motion to reopen the case, but held the request for distribution of funds in abeyance pending an evidentiary hearing. In reaching this decision, the court explained that although the assignment of rents provision of Paragraph 16 of the mortgage entitled Oppmac to the escrowed funds, questions of fact existed regarding whether Oppmac complied with the statutory requirements for enforcement of the assignment of rents provision as set forth in MCL 554.231. After the subsequent hearing, the court determined that as Bioresource was in default under Paragraph 16 of the mortgage held by Oppmac, and Oppmac's failure to serve notice of the default on the occupiers of the premises was not fatal to enforcement of the assignment of rents under MCL 554.231 as interpreted by *In re PMG Properties*, 55 BR 864 (Bankr ED Mich, 1985), Oppmac was entitled to the escrowed rent.

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property taxes to Wayne County.

[5] Apparently, the trial court dissolved the requirement that Oppmac pay Bioresource's deficient taxes in addition to the $700,000 redemption amount because the city retained possession of the property and profits from the property between 1997 and 1999.

On reconsideration, the court rejected the city's argument that *PMG Properties* was not applicable since the assignment of rents provision was enforced against Bioresource, as the mortgagor, and not the occupiers of the premises. Additionally, the court noted that although Oppmac was a dissolved corporation, its intervention was proper under MCL 450.1834. The following appeal ensued.

II. ANALYSIS

A. THE VALIDITY OF OPPMAC'S MORTGAGE INTEREST

As its first assignment of error, the city argues that Oppmac failed to prove that it had a valid mortgage interest in the property. To the extent the city raises this issue on the grounds asserted in its motion for reconsideration (i.e., that the 1999 mortgage loan agreement failed to assign the mortgage to Oppmac), our review is for an abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000). Otherwise, our review is for plain error affecting substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000). A trial court abuses its discretion when its decision is outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

In raising this issue, the city attacks the validity of Oppmac's mortgage interest on several fronts: namely, that Oppmac failed to prove that (1) L & N in fact assigned the mortgage;[6] (2) the mortgagor (i.e., Bioresource or Bioresource's predecessor) actually assigned Astro's lease and rents to L & N as required under Paragraph 16 of the mortgage; or (3) that L & N even had a mortgage interest to assign when it failed to assert its interest in Bioresource's previous bankruptcy proceedings.

While each of these arguments seeks to undermine Oppmac's status as mortgagee, that issue was already conclusively resolved below, and the city failed to challenge that ruling in its prior appeals. Indeed, as this Court observed in *Bioresource I*, "Oppmac's interest in the property was addressed in prior proceedings, wherein it was determined that Oppmac had a mortgage interest in the property, which it apparently may foreclose upon." Additionally, *Bioresource II* pointed out that the city mounted no challenge to the effect of redemption, i.e., that Bioresource's interest was subject to Oppmac's mortgage, *Bioresource II*, unpublished op at 4. Importantly, that conclusion necessarily presupposes the validity of the mortgage through which Oppmac claims the rent at issue. Consistent with this, not only did the trial court's order concerning the city's motion to reopen the case expressly acknowledge that "Oppmac has the

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[6] In particular, the city asserts that the 1999 mortgage loan agreement was insufficient to prove that the mortgage was in fact assigned to Oppmac because that document merely constituted an agreement between Oppmac and L & N to transfer the mortgage. We note that the city's citation to four alleged amendments to the 1999 mortgage loan agreement that were apparently presented in a different case are not contained in the record before us and therefore their consideration is not proper on appeal. *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002).

legal right [under the mortgage] to collect the rents assigned to it[,]" but also the court's order denying reconsideration specifically noted that Oppmac's status as the mortgagee in this case was "undisputed."

In light of this, for the city to challenge the validity of Oppmac's mortgage interest at this juncture amounts to an impermissible collateral attack on a previously resolved issue. See *People v Howard*, 212 Mich App 366, 369; 538 NW2d 44 (1995) ("a collateral attack occurs whenever a challenge is made to a judgment in any manner other than through a direct appeal"); see also, *Kosch v Kosch*, 233 Mich App 346, 353; 592 NW2d 434 (1999) ("Defendant's failure to file an appeal from the original judgment . . . pursuant to MCR 7.205(A) or (F), precludes a collateral attack on the merits of that decision.") As we previously stated in *Bioresource II*, "If the city disagreed with the court's ruling, it should have filed a direct appeal from that decision." *Bioresource II*, unpublished op at 4, citing *Welch v Dist Court*, 215 Mich App 253, 257; 545 NW2d 15 (1996). We will not revisit the validity of Oppmac's claim to rent through its mortgage interest at this point in the proceedings.

B. MCL 554.231 AND MCL 554.232

Next, the city contends that Oppmac's failure to comply with the requirements of MCL 554.231 and MCL 554.232 precluded its claim to the escrowed rent. We review issues of statutory interpretation de novo. *Gladych v New Family Homes, Inc*, 468 Mich 594, 597; 664 NW2d 705 (2003).

MCL 554.231 governs assignment of rent provisions in mortgage agreements. That section provides:

> Hereafter, in or in connection with any mortgage on commercial or industrial property other than an apartment building with less than 6 apartments or any family residence to secure notes, bonds or other fixed obligations, it shall be lawful to assign the rents, or any portion thereof, under any oral or written leases upon the mortgaged property to the mortgagee, as security in addition to the property described in such mortgage. Such assignment of rents shall be binding upon such assignor only in the event of default in the terms and conditions of said mortgage, and shall operate against and be binding upon the occupiers of the premises from the date of filing by the mortgagee in the office of the register of deeds for the county in which the property is located of a notice of default in the terms and conditions of the mortgage and service of a copy of such notice upon the occupiers of the mortgaged premises. [MCL 554.231.]

Here, although Paragraph 16 of the mortgage agreement required the mortgagor to assign leases to the mortgagee "[a]s additional security" and permitted the mortgagee to collect rent in the event of default in accordance with MCL 554.231, the city maintains that Oppmac's failure to record and serve a notice of default on Astro and the city was fatal to Oppmac's claim for the escrowed rent under MCL 554.231. Such an argument, however, misapprehends the plain language of the statute.

As *Otis Elevator Co v Mid-America Realty Investors*, 206 Mich App 710, 713-714; 522 NW2d 732 (1994), explains:

> Notably, the statutory language states that such an "assignment of rents shall be binding upon such assignor only in the event of default. . . ." Thus, the mortgagor's default is sufficient to finalize the mortgagee's interest in the rents as against the mortgagor. The additional language requiring service of notice of default upon the "occupiers" or tenants concerns the operation of the assignment as against the tenants, not as against the assignor.

Consequently, under the plain language of the statute, the assignment of rent to Oppmac became binding upon Bioresearch's default on the mortgage. Thus, Oppmac's right to the rent was not contingent upon the filing or service of default. *Id*. Rather, the filing and service provision of MCL 554.231 merely serves to protect the tenant with respect to whether rent is owed to the mortgagor or mortgagee and "'does not affect the rights between mortgagor and mortgagee.'" *Id*. at 714, quoting *In re Mount Pleasant Ltd Partnership*, 144 BR 727, 733-734 (Bankr WD Mich, 1992). Since in this case the rent due was already in escrow, the filing and service of default provision was inapplicable with respect to the enforceability of Paragraph 16 under MCL 554.231 because there was no issue concerning the operation of the assignment against the tenant, i.e., Astro.

Relying on *In re Mount Pleasant* and *In re Woodmere Investors Ltd Partnership*, 178 BR 346 (Bankr SD NY, 1995) and distinguishing *In re PMG Properties* at length, the city counters that at issue is not the enforceability of the mortgage agreement against a mortgagor or tenant, but the enforceability of the mortgage against the city as a third party where Oppmac failed to properly record its assignment of rent.

At first blush, this argument appears compelling in view of the fact that MCL 554.232 requires a mortgagee to record an assignment of rent provision in order to perfect its interest against "those claiming [the interest] under or through [the mortgagor] . . . ."[7] MCL 554.232; *In re Mount Pleasant Ltd Partnership*, 144 Bankr at 733. However, the distinguishing factor in this case is that Oppmac's right to the rental escrow under the mortgage derived from its redemption of the property from the city, not from the priority of its mortgage interest over any interest the city may have previously had. Indeed, as the city readily admits, its claim to rent was based on its claim of title and not on the status of one "claiming [its interest] under or though [Bioresource]." Consequently, when Oppmac redeemed the property thereby reviving title in Bioresource subject to Oppmac's mortgage, the city – being divested of title – lost its claim to

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[7] MCL 554.232 provides:

> The assignment of rents, when so made, shall be a good and valid assignment of the rents to accrue under any lease or leases in existence or coming into existence during the period the mortgage is in effect, against the mortgagor or mortgagors or those claiming under or through them from the date of the recording of such mortgage, and shall be binding upon the tenant under the lease or leases upon service of a copy of the instrument under which the assignment is made, together with notice of default as required by section 1.

rent.[8] In light of this, contrary to the city's claim, it is inconsequential that as a third party the mortgage agreement was not binding on it. And in the same vein, as one not "claiming [the interest] under or through [the mortgagor]," the city cannot invoke the recording provisions of MCL 554.232 or MCL 554.231 to defeat Oppmac's claim.[9]

The trial court's conclusion also did not run afoul of *Smith v Mutual Benefit Life Ins Co*, 362 Mich 114; 106 NW2d 515 (1960), and *Detroit Trust Co v Detroit City Services Co*, 262 Mich 14; 247 NW2d 76 (1933), as the city claims. First, *Smith* did not address the effect of filing and service of an assignment of rents clause, but instead observed that the particular filing and service of notice in that case complied with the relevant statutory requirements. *Smith*, 362 Mich at 125. Second, at issue in *Detroit Trust Co* was whether the mortgagee's failure to provide service to the occupiers of the land was fatal to the mortgagee's assignment of rents claim. *Detroit Trust Co*, 262 Mich at 41-42. As previously concluded, however, in this case the issue of service to the occupier of the property (i.e., Astro) is of no consequence. Thus, neither *Smith* nor *Detroit Trust Co* supports the city's contentions.

C. OPPMAC'S STATUS AS A DISSOLVED CORPORATION

The city next argues that since Oppmac, as a dissolved corporation,[10] failed to prove that its intervention was for windup and liquidation purposes, the court erred in permitting Oppmac to intervene. There is no merit to this claim, however, where MCL 450.1833(a) permits a dissolved corporation to windup its affairs by collecting assets and MCL 450.1834(e) permits such a corporation to sue or be sued in its corporate name "in the same manner as if dissolution had not occurred." Oppmac's intervention was just the sort of suit contemplated by these statues. Thus, Oppmac's dissolution did not preclude its intervention here.

D. RES JUDICATA AND COLLATERAL ESTOPPEL[11]

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[8] The city also argues that the bankruptcy court's final order effectively terminated Paragraph 16 of the mortgage. However, notwithstanding the effect of the bankruptcy proceedings on Oppmac's interest prior to redemption (during which time Oppmac alleges the city collected "profits" from the property), this argument amounts to another collateral attack on the viability of Oppmac's mortgage interest, which as discussed above, is improper. *Bioresource II*, unpublished op at 4.

[9] That Astro became a month-to-month tenant when its lease term with Bioresource expired prior to Oppmac's redemption does not alter this analysis. Indeed, not only does MCL 554.232 contemplate assignment "under any lease . . . coming into existence during the period of the mortgage," but also Paragraph 16 provides that the mortgagee's security interest includes both existing and future leases.

[10] Apparently, Oppmac dissolved in 2002 for failure to file reports and pay fees and penalties.

[11] The city also claims Oppmac was barred from collecting rent under the doctrine of waiver. However, having failed to elaborate in any way how Oppmac waived its claim to rent by voluntarily relinquishing a known right, *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000), we deem this argument abandoned, *Wayne Co v Hathcock*, 471 Mich 445, 465-466;
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Finally, the city claims that under the doctrines of res judicata and collateral estoppel,[12] the following determinations barred Oppmac's claim for the escrowed rent: (1) the bankruptcy court's order confirming Bioresource's plan of reorganization; (2) the final order in Oppmac's previous suit against the city, which granted summary disposition in the city's favor; and (3) the trial court's order of October 28, 2005, denying Bioresource's motion for summary disposition.

As the city admits, however, Oppmac's claim to the rent derives from its status as assignee of the L & M mortgage – a fact that was already determined in prior proceedings. *Bioresource I*. And as we have previously set forth, the city failed to challenge in its most recent appeal to this Court that Bioresource held title to the property *subject to Oppmac's mortgage interest* as a consequence of redemption. *Bioresource II*, unpublished op at 4. It is precisely this interest that the city seeks to undermine in raising the issues of res judicata and collateral estoppel. However, the city certainly could have raised these issues in its prior appeal if it disagreed with the prior rulings, and its failure to do so does not oblige us to entertain this collateral attack at this juncture. *Kosch* 233 Mich App at 353; *Howard*, 212 Mich App at 369.

Affirmed.

/s/ Kathleen Jansen
/s/ Christopher M. Murray
/s/ Elizabeth L. Gleicher

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684 NW2d 765 (2004).

[12] Whereas res judicata bars a subsequent action based on the same claim as a prior action, collateral estoppel, or issue preclusion, bars relitigation of an issue in a subsequent, different cause of action that was already determined in the prior cause of action. *Chestonia Twp v Star Twp*, 266 Mich App 423, 429; 702 NW2d 631 (2005); *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001).